Supreme Court, U.S.
FILED
DEC 29 1982
ALEXANDER L. STEVAS
CLERK

No. 82-472

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH C. RUSSELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether profits from racketeering activities acquired through a violation of 18 U.S.C. 1962(c) constitute an interest subject to forfeiture under 18 U.S.C. 1963(a)(1).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Richards v. *United States*, 369 U.S. 1	7
United States v. *Godoy*, 678 F.2d 84, petition for cert. pending, No. 82-538	5
United States v. *Long*, 654 F.2d 911	4
United States v. *Martino*, 648 F.2d 367, cert. denied, No. 81-1458 (Apr. 26, 1982)	2
United States v. *Marubeni America Corp.*, 611 F.2d 763	4, 5
United States v. *Rubin*, 559 F.2d 975	5
United States v. *Wong Kim Bo*, 472 F.2d 720	6
United States v. *Wooten*, No. 81-5266 (4th Cir. Sept. 3, 1982)	6-7

Statutes:

Controlled Substances Act, 21 U.S.C. 848 *et seq.*:	
21 U.S.C. 848	9
21 U.S.C. 848(a)(2)	8
21 U.S.C. 848(a)(2)(A)	8, 9
Racketeer Influenced and Corrupt Organizations Act (RICO), Title IX, 18 U.S.C. 1961 *et seq.*:	
18 U.S.C. 1962	4, 7
18 U.S.C. 1962(a)	3
18 U.S.C. 1962(b)	3
18 U.S.C. 1962(c)	2, 3
18 U.S.C. 1962(d)	2
18 U.S.C. 1963	3

Statutes—Continued Page

18 U.S.C. 1963(a) 2, 5, 6
18 U.S.C. 1963(a)(1) 3, 4, 5, 6
18 U.S.C. 1963(a)(2) 2, 6
18 U.S.C. 1963(c) 2
18 U.S.C. 1341 2

Miscellaneous:

Black's Law Dictionary (4th ed. 1968) 7
H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970) 7
Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1969) 8
S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969) 8
The Random House Dictionary of the English Language, Unabridged (1966) 7
Webster's Third New International Dictionary, Unabridged (1976) 7

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-472

JOSEPH C. RUSSELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-36) is reported at 681 F.2d 952. The panel opinion is reported at 648 F.2d 367.[1]

JURISDICTION

The judgment of the en banc court of appeals was entered on August 2, 1982. The petition for a writ of certiorari was filed on September 9, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The portion of the panel opinion relating to the forfeiture issue appeared in the advance sheets (648 F.2d at 407-409) but was deleted after rehearing was granted.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner and 15 others were convicted of racketeering and mail fraud, in violation of 18 U.S.C. 1341, 1962(c), and 1962(d).[2] After the verdicts on the criminal charges were returned, the jury returned a special verdict requiring the forfeiture, pursuant to 18 U.S.C. 1963(a) and (c), of four payments totalling $340,043.69 that were made to petitioner by his insurance company (Pet. App. 5-6). The district court then entered a judgment of forfeiture against petitioner in that sum. A panel of the court of appeals reversed, but the court of appeals sua sponte ordered rehearing en banc on the forfeiture issue and vacated that portion of the panel opinion (648 F.2d at 409). The en banc court then affirmed the district court's judgment of forfeiture (Pet. App. 1-36).

1. The proof at trial is described in the panel opinion (648 F.2d at 378-380, 409-411) and the en banc opinion below (Pet. App. 4-5). Briefly, the evidence showed that petitioner and his co-conspirators formed an association in fact responsible for burning down buildings in order to collect insurance proceeds. Petitioner was the owner of the Central Professional Building in Tampa. That building consisted of two sections—an original, smaller section in the front and a newer addition in the rear. The

---

[2] The court of appeals panel, although reversing the forfeiture, affirmed petitioner's convictions on two counts of mail fraud, conspiracy to violate the RICO statute, and a substantive RICO violation (*United States* v. *Martino*, 648 F.2d 367 (5th Cir. 1981)), and this Court denied certiorari, No. 81-1458 (Apr. 26, 1982).

rear part, which was completed in the summer of 1975, contained apartments, offices, and parking facilities. Petitioner schemed to burn the front section, to collect the insurance proceeds on his $925,000 in policies, and to use the funds to rebuild the front part to match the newer and more profitable rear section. A fire was subsequently set, and petitioner collected $340,043.69 in insurance proceeds.

2. In initially reversing the judgment of forfeiture (slip op. 8274-8276), a panel of the court of appeals found that "Congress did not intend to include in the forfeiture provision of Section 1963 the fruits and profits obtained from a pattern of racketeering activity" (slip op. 8275). The en banc court of appeals disagreed and reinstated the forfeitures. The court first noted that racketeering profits fall within the plain meaning of Section 1963(a)(1), which calls for the forfeiture of "any interest * * * acquired or maintained in violation of section 1962." The term "any interest," the court held, was to be given its broad, literal meaning (Pet. App. 7-8).

Rejecting the argument that Congress intended to reach only "interests in an enterprise," the court noted (Pet. App. 7) that such a limitation was omitted from Section 1963(a)(1) but was expressly included in other provisions of the statute with respect to which Congress intended to impose such restrictions. The court also rejected (Pet. App. 8-11) the argument that Section 1963(a)(1) applied only to interests acquired in violation of Section 1962(a) or (b) and not, as in this case, interests acquired in violation of Section 1962(c). Finally, the court found support for its interpretation in legislative history showing that Congress intended to create a broad forfeiture penalty and to remove the profit from organized crime (Pet. App. 12-20).

DISCUSSION

This case presents a potentially significant question concerning the interpretation of the RICO statute that has divided the courts of appeals, *i.e.*, whether income derived from racketeering activity is subject to forfeiture. Accordingly, we do not oppose the grant of the instant petition for a writ of certiorari.

1. The court below held that income and profits obtained from racketeering activity in violation of 18 U.S.C. 1962 are subject to forfeiture under 18 U.S.C. 1963(a)(1), which requires the forfeiture of "any interest * * * acquired or maintained in violation of [Section 1962]" by any person convicted of violating that provision. As the court below recognized (Pet. App. 21), its decision is inconsistent with *United States* v. *Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980),[3] in which the court held that 18 U.S.C. 1963(a)(1) reaches only interests in an enterprise and not uninvested racketeering profits or income.[4]

---

[3] There is a factual distinction between *Marubeni* and the present case, but neither court relied upon that distinction in reaching its decision. In *Marubeni* the interest that the government sought to forfeit was all monies received under a public contract obtained through bid-rigging. These monies represented not only profits but the actual cost of goods and services furnished under the contract. Here, by contrast, the entire amount forfeited consisted of profit from arson and fraud. Nevertheless, it appears to us that the holding and reasoning of *Marubeni* would require the Ninth Circuit to reach the opposite result from the Fifth Circuit on the facts of the instant case.

[4] Petitioner erroneously asserts (Pet. 6) that the decision below also conflicts with *United States* v. *Long*, 654 F.2d 911 (3d Cir. 1981). That case, however, concerned forfeiture

This is an issue of substantial and continuing importance. The government's ability to punish and deter racketeering depends to a significant degree upon its ability to deprive those engaged in organized crime of their sources of economic power. Consequently, the criminal forfeiture provisions of the RICO statute are among the most potent prosecutorial weapons in the government's efforts to curb organized crime. As construed by the Ninth Circuit in *Marubeni*, however, those provisions are deprived of much of their effectiveness, because the forfeiture of uninvested racketeering profits and income is not allowed. While the government is permitted under that interpretation to seek forfeiture of interests in an "enterprise," that power is of little use in the large number of cases in which the enterprise charged in the indictment is an informal association-in-fact devoted solely to criminal ends. Such enterprises typically have no formal legal existence, do not issue stock, do not have formal officers or employees, and do not hold property in their own names. Thus, there are usually no interests in such enter-

---

under the narcotics forfeiture statute, and the reference to RICO forfeiture in a footnote is dictum (see *id.* at 915 n.6). Similarly, petitioner relies upon dictum in *United States* v. *Rubin*, 559 F.2d 975, 990-993 (5th Cir. 1977), which upheld the forfeiture of a union office under 18 U.S.C. 1963(a). Assuming *Rubin* conflicted with the decision below, it was overruled by the en banc decision in this case. Finally, petitioner relies upon *United States* v. *Godoy*, 678 F.2d 84 (9th Cir. 1982), petition for cert. pending, No. 82-538, which was decided by the same court that decided *Marubeni*. *Godoy*, however, concerns an entirely different question (on which the government prevailed), *i.e.*, whether an interest in an enterprise acquired through the investment of racketeering profits is subject to forfeiture under 18 U.S.C. 1963(a)(1).

prises that may be obtained by forfeiture. Moreover, even in cases involving other types of enterprises, the government will be unable to take the profit out of organized crime unless it can seek forfeiture of racketeering profits and income that are not used to acquire interests in enterprises. Under *Marubeni*, however, racketeering profits and income are probably beyond the reach of the RICO forfeiture provisions if deposited in a bank or used to purchase precious metals or other valuable objects.

2. a. While we do not oppose the granting of the instant petition for a writ of certiorari, we believe that the decision below was correct. 18 U.S.C. 1963(a) provides that upon conviction a defendant shall forfeit to the United States "(1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962." Petitioner argues that the term "interest," as used in Section 1963(a)(1), does not encompass profits or proceeds but instead means "interest[] in an enterprise." However, as the court below concluded (Pet. App. 8), if Congress had intended to limit forfeiture to interests "in an enterprise" it could have done so expressly, as it did in Section 1963(a)(2). "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, * * * [it] acts intentionally and purposely in the disparate inclusion or exclusion.'" Pet. App. 7, quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972); see also *United States* v.

Wooten, No. 81-5266 (4th Cir. Sept. 3, 1982), slip op. 25.

Moreover, as the en banc court recognized (Pet. App. 7-8), "the ordinary meaning of the words used [in the statute]" (see *Richards* v. *United States*, 369 U.S. 1, 9 (1962)) encompasses profits or proceeds. Dictionaries include "profit" in their definitions of "interest."[6] Congress similarly used the term broadly in its reports and debates. For example, it referred to criminal forfeiture "of all property and interests, as broadly described, which are related to the [Section 1962] violations." H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 57 (1970).[7]

b. The court below also correctly rejected petitioner's claim (Pet. 10-11) that the legislative history demonstrates that Congress did not wish to permit forfeiture of racketeering profits (Pet. App.

---

[6] See, *e.g.*, *Webster's Third New International Dictionary, Unabridged* 1178 (1976); *The Random House Dictionary of the English Language, Unabridged* 741 (1966). *Black's Law Dictionary* 950 (4th ed. 1968), explains that interest includes the "right to have the advantage accruing from anything," and states that "interest" is "the most general term that can be employed to denote a right, claim, title, or legal share in something."

[7] Petitioner argues (Pet. 9) that "interest" must derive its meaning from Section 1962 because the statute refers back to that section. The en banc court correctly rejected that interpretation of the reference, stating (Pet. App. 10): "To be sure, the reference serves a kind of limiting function, but that function is not to define the type of forfeitable interests, as defendants and amicus assume. Rather, the reference merely identifies the illegal activities which trigger the forfeiture penalty, supplying the nexus between the RICO violation and the forfeitable property." In other words, the reference to Section 1962 defines the illegal activity, not the term "interest."

12-20). After carefully examining the legislative history, the court concluded that "Congress' express[ed] objective * * * [was] to take the profit out of organized crime" (Pet. App. 14; footnote omitted). The court also found to be inconclusive (Pet. App. 18-20) a letter to Congress by then Deputy Attorney General Kleindienst (*Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 407 (1969)) addressing the constitutionality of the RICO criminal forfeiture provisions. Mr. Kleindienst wrote that the forfeiture provision was constitutional since it was limited to a defendant's "interest in the enterprise which is the subject of the specific offense." As the court explained (Pet. App. 20), the letter related specifically to the RICO legislation then pending, which included a single forfeiture provision applicable only to interests in an enterprise. Although the Senate Report on the RICO statute cited that letter (see S. Rep. No. 91-617, 91st Cong., 1st Sess. 79 (1969)), "nothing in the report suggests that the letter provides a technical commentary on the scope of each section of the expanded bill" (Pet. App. 20).

c. Petitioner also suggests (Pet. 7) that inclusion in the Controlled Substances Act, 21 U.S.C. 848(a)(2)(A), of a forfeiture provision specifically directed at illegal "profits" is probative of a congressional intent to exclude profits from the reach of the RICO statute.[8] However, language in one

---

[8] 21 U.S.C. 848(a)(2) provides:

Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

statute generally sheds little light upon the meaning of language in a separate statute, even where the two were enacted during the same session. Here, as the court below correctly observed (Pet. App. 23), the use of "the more comprehensive term in RICO is a logical byproduct of the different evils addressed by the two acts." The RICO statute was broadly aimed at all the sources of organized crime's economic power, including cash assets and profits, ownership interests in legitimate and illegitimate enterprises, all types of contraband, stolen securities, and illegally obtained contract rights. Only a broadly defined forfeitable interest could include all these assets and other sources of power. By contrast, since the narcotics activity proscribed by 21 U.S.C. 848 consists of repeated and continuing dealings in the importation or sale of illegal drugs for money, an interest acquired in violation of that provision will usually consist of profits. Thus, it was natural that Congress employed much narrower and more specific language in 21 U.S.C. 848(a)(2)(A).[9]

(A) the profits obtained by him in such enterprise, and

(b) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

[9] Indeed, several earlier narcotics forfeiture bills proposed by the 91st Congress (see H.R. 1690, H.R. 17463, S. 3246) provided for forfeiture of "(1) the profits obtained by any activity in violation of the Act, (2) any interest acquired or maintained in violation of the Act, and (3) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise." Subsection (2) was ultimately eliminated from the final version. Although the reasons behind its elimination were not expressed, it is safe to presume that Congress thought it redundant since the interests were already reached by forfeiture of profits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

SARA CRISCITELLI
Attorney

DECEMBER 1982

★ U. S. GOVERNMENT PRINTING OFFICE: 1982 [illegible] 1211